88-753

No. _____

Supreme Court, U.S.
FILED
NOV 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the

Supreme Court of the United States

October Term, 1988

In Re: FCX, INC.; Employer's Identification No. 560220040,
Debtor

UNIVERSAL COOPERATIVES, INC.,
Petitioner,

v.

FCX, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Eugene M. Warlich*
James R. Crassweller
DOHERTY, RUMBLE & BUTLER, P.A.
2800 Minnesota World Trade Center
30 East Seventh Street
Saint Paul, Minnesota 55101-4999
(612) 291-9333
Attorneys for Petitioner

* **Counsel of Record**

1988 — Bachman Printing, 835 Second Avenue So., Mpls., MN 55402 — (612) 339-9518 ■ FAX 612-337-8053

QUESTIONS PRESENTED

Respondent is a debtor-in-possession in a Chapter 11 bankruptcy proceeding. Petitioner has filed its claim as a secured creditor. Petitioner was not listed as a secured creditor which was impaired under Respondent's plan for reorganization, and no formal plan modification was ever accomplished.

Both Petitioner and Respondent are cooperative associations. Respondent held equity certificates issued by Petitioner reflecting a face amount greater than Respondent's indebtedness to Petitioner. These certificates, not a current indebtedness of Petitioner, could be redeemed only by the board of directors of the Petitioner exercising its discretion to do so. Any redemption, however, must be on an equitable basis; that is, the board must treat all members which are similarly situated on an equal basis when it exercises is discretion. Petitioner, pursuant to its articles of incorporation, could setoff these equity interests against indebtedness owed by the holders, but the articles preclude the holders from demanding the right to setoff. Present value of equity certificates is substantially less than face amount because redemption occurs, if at all, years after the certificates are issued.

1. Whether § 1123(a)(5)(D) of the Bankruptcy Code requires a secured creditor to setoff debtor's indebtedness to that creditor against debtor's equity certificates in creditor in violation of the articles of incorporation of creditor and state law to satisfy creditor's secured claim when the equity certificates are not a present obligation of the creditor and constitute no more than a contingent interest in the creditor.

2. Whether the Bankruptcy Court can authorize plan modification without requiring the debtor to follow the plan modification requirements mandated by Congress.

3. If setoff can be required and can be accomplished without written plan modification, whether the debtor's orally modified plan can be crammed down over the objection of the secured creditor in view of the provisions of § 506(a) of the Bankruptcy Code, the indubitable equivalent standard of § 1129(b)(2)(A)(iii) of the Bankrupcty Code, and this Court's reference to that section in *United Savings Association v. Timbers of Inwood.*

LIST OF PARTIES

Petitioner is Universal Cooperatives, Inc., a cooperative association organized and existing under the laws of the State of Minnesota.

Respondent is FCX, Inc., a debtor-in-possession and a North Carolina farmers' cooperative.

TABLE OF CONTENTS

Page

Questions Presented i

List of Parties ii

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Statutes Involved 1

Statement of the Case 1

Reasons for Granting the Writ of Certiorari 8

A. The Decision Of The Court Of Appeals For The Fourth Circuit Is In Conflict With A Decision Of The Court Of Appeals For The Eighth Circuit 8

B. The Decision Of The Court Of Appeals Is In Conflict With A Decision Of This Court And Ignores The Relationship Between Sections 506(a) And 1129(b) Of The Bankruptcy Code 9

C. The Court Of Appeals Has Sanctioned A Departure Of The Bankruptcy And District Courts From The Procedural Requirements Mandated By Congress For Plan Modification In Chapter 11 Bankruptcy Proceedings As To Require The Exercise Of This Court's Supervisory Power 11

Conclusion 15

TABLE OF AUTHORITIES

Page

Cases:

In Re: Continental Airlines, Inc.,
780 F.2d 1223 (5th Cir. 1986) 12, 13

In Re: Massengill, 73 B.R. 1008
(E.D.N.C. 1987) 6

In Re: Murel Holding Corporation,
75 F.2d 941 (2d Cir. 1935) 10

In Re: Schauer, 835 F.2d 1222
(8th Cir. 1987) 9

Norwest Bank Worthington v. Ahlers,
____ U.S. ____, 108 S.Ct. 963 (1988) 13, 14

United Savings Association v. Timbers of Inwood,
____ U.S. ____, 108 S.Ct. 626 (1988) ..... i, 10

Statutes:

11 U.S.C. § 363 ..... 9, 12

11 U.S.C. § 506(a) ..... i, 8, 9, 10, 11
11 U.S.C. § 704 9
11 U.S.C. § 1122 ..... 11, 12, 13
11 U.S.C. § 1123 ..... 11, 12, 13
11 U.S.C. § 1123(a)(4) 12
11 U.S.C. § 1123(a)(5)(D) ..... i, 7, 8
11 U.S.C. § 1125 ..... 12, 13
11 U.S.C. § 1127 11
11 U.S.C. § 1127(b) 11, 13

11 U.S.C. § 1127(c) 12, 13
11 U.S.C. § 1129 ..... 10, 13
11 U.S.C. § 1129(b) 6, 8, 9, 10, 11
11 U.S.C. § 1129(b)(2)(A)(iii) ..... i, 7, 8, 9
11 U.S.C. § 1129(b)(2)(B) 14

Textbook:

1 Bankruptcy Code 263 (Collier Pamphlet Edition, 1988) 11

1 Bankruptcy Code 685 (Collier Pamphlet Edition, 1988) 10

Petitioner herein respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on August 11, 1988.

OPINIONS BELOW

The Court of Appeals for the Fourth Circuit issued its opinion, reproduced at Appendix p. A-12, on August 11, 1988. The judgment entered by the Court of Appeals on its opinion is dated August 11, 1988 is reproduced at Appendix p. A-29. The Order (and Opinion) of the District Court of December 22, 1987 is reproduced at Appendix p. A-30. The underlying Memorandum Opinion and Order of the Bankruptcy Court of June 23, 1987 is reproduced at Appendix p. A-35.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on August 11, 1988. Jurisdiction of this Court is invoked under the authority of 28 U.S.C. § 1254(1).

STATUTES INVOLVED

11 U.S.C. § 506(a) ..... Appendix A-1
11 U.S.C. § 1122 ..... Appendix A-2
11 U.S.C. § 1123 ..... Appendix A-3
11 U.S.C. § 1125 ..... Appendix A-5
11 U.S.C. § 1127(b), (c) ..... Appendix A-7
11 U.S.C. § 1129 ..... Appendix A-8

STATEMENT OF THE CASE

Jurisdiction in the Bankruptcy Court was founded on 28 U.S.C. § 1334(a) and 28 U.S.C. § 157(a).

This Petition involves substantial questions relating to the Bankruptcy Code of the United States, its relation to state law and to the power of the Bankruptcy Court to ignore the procedures mandated by Congress with respect to notice, hearing, and valuation for plan modification under Chapter 11 of that Code. The decision requested to be reviewed also creates a split between the circuit courts of appeal as to the balance between the Bankruptcy Code and state and contract law.

Respondent is a debtor-in-possession having filed its petition for reorganization under Chapter 11 of the United States Bankruptcy Code. Petitioner thereafter properly filed its proof of secured claim. Subsequently, Respondent filed its disclosure statement and plan of reorganization, neither of which identified Petitioner as a secured creditor which would be impaired by the plan of reorganization. Neither the disclosure statement nor the plan of reorganization disclosed that Respondent intended to satisfy Petitioner's secured claim by other than a cash payment.

The plan of reorganization was confirmed. Respondent subsequently filed a notice of intent to abandon a portion of the collateral held by Petitioner as security for its claim in full satisfaction of Petitioner's secured claim. There was no provision made for an abandonment under the plan, and no disclosure of an intent to abandon was included in the disclosure statement. Petitioner objected to Respondent's motion to abandon.

Both Petitioner and Respondent are cooperative associations. Petitioner is a cooperative association organized and existing under the law of Minnesota. Respondent is a cooperative association organized and existing under the law of North Carolina. Respondent had been a member of Petitioner since Petitioner's creation in 1980 and a member of one of its predecessors prior thereto.[1] As a member, Respondent holds certificates of participation in varying amounts for various fiscal years as far back as 1972. As of May 15, 1987, Respondent held certificates of participation in Petitioner in the total amount of $1,116,129.

---

[1]In the 1930s, United Cooperatives and National Cooperatives were formed. In 1972, they merged to form Universal Cooperatives, a Wisconsin cooperative. In 1980, Universal Cooperatives of Wisconsin merged into Universal Cooperatives, Inc., a Minnesota cooperative. FCX was a member of United Cooperatives.

Petitioner is an inter-regional cooperative that sells farm supplies to its members, which are also cooperatives, such as Respondent. The members who deal with Petitioner are termed "members" or "patrons." Petitioner is required to distribute its net income (termed "net proceeds", as specifically defined in Section 1 of Petitioner's By-Law VI; Appendix p. A-107). According to state law, and Petitioner's By-Laws, distribution, at the discretion of the Board of Directors, can be made in the form of cash, in qualified or nonqualified written notices of allocation, or any combination thereof. (Appendix p. A-108) In compliance with state law and its By-Laws, Petitioner has, over the years, distributed patronage dividends partially in cash and partially in certificates of participation (often called "equity certificates" or just "equities") representing that amount allocable to the individual member based upon its proportionate share of business done with member-shareholders and subscription patrons. (By-Law VI, Section 2(d); Appendix p. A-108)

Once certificates of participation are issued, the By-Laws authorize Petitioner to revolve or redeem them "on an equitable basis in whole or in part at such time, in such manner, and in such order as shall be determined by the Board of Directors". (By-Law VI, Section 4; Appendix p. A-110) Since its formation in 1980, Petitioner has periodically provided for partial redemption of the outstanding certificates on an equitable basis by revolving the oldest equities first. To the present date, no redemption of certificates of participation representing a patronage refund for operations of Petitioner as a Minnesota cooperative has been made. The only revolvement of patronage equities consist of payment for equities existing in the cooperatives that merged to form Petitioner in October of 1980—premerger equities.

Cooperatives, generally, are significantly different from proprietary corporations. Petitioner's existence, authorized by statute, is based upon cooperative principles in which its members agree to a limited return on capital in exchange for services, democratic control, and ownership by the member patrons. Petitioner's members make a conscious decision to accept the cooperative concept that Petitioner is an ongoing entity which is obligated by statute and by-laws to act for the benefit of its members as a whole and not the short term interest of an individual member.

Cooperatives are financed differently from business corporations. While cooperatives may have a form of capital stock, this is usually of nominal value in nominal amounts. A cooperative's working capital and capital used for bricks and mortar comes almost exclusively from the savings or profits earned in its business. As indicated above, these savings or profits are distributed partially in cash, but mostly (usually 80 percent) in what is generically called equity certificates or certificates of participation. If there are no savings or profits in a particular year, there is nothing to distribute. In years where savings or profits are high and relatively little additional capital is needed, equity certificates issued years earlier may be redeemed for cash on a nondiscriminatory basis. It is not uncommon for cooperatives to be redeeming equity certificates issued fifteen or twenty years earlier. It is not uncommon, in hard times or in times of substantial capital need, not to redeem any equity certificates for a year or several years. Moreover, if a cooperative goes out of business, it will probably leave unredeemed, equity certificates issued over many years. Current needs are met from the retained savings. Profits are derived primarily from business done with current members and other customers. When times are good, old certificates are redeemed first so that the holders of those who contributed to the capital in years past are paid first. The purpose of a revolving policy of a Board of Directors is that current members and patrons finance the cooperative. Once the policy is adopted, to depart from it is inequitable to those who financed the cooperative in the past and gives preference to any member or members whose equity is revolved out of the revolving order. A departure from the policy should occur only at the discretion of the Board of Directors and then only when not to depart would be inequitable to the membership as a whole. Finally, equity certificates have no market and essentially cannot be sold. On the other hand, there is usually a market for corporate stock, even that of a privately held corporation.

Economic circumstances of a cooperative vary. A cooperative's capital must come from amounts retained and represented by equity certificates. Indebtedness due from a cooperative's members, however, is normally due to the sale of products by the coopera-

tive to its members, i.e., current and ongoing sales. It is from these sales that, hopefully, profits are derived and from which equity certificated may be redeemed.

It is for all these reasons that the redemption, often called revolvement, of equity certificates must be at the discretion of the Board of Directors. A member or holder of these certificates cannot be in a position to be able to demand a setoff. To place any cooperative in a position which would require it to redeem or setoff equities held by its present or former members could place it in the position of being forced to liquidate a substantial portion of its necessary capital or incur additional debt at any time at the whim of one or more of its members or former members to the detriment of its members as a whole.

Petitioner filed its proof of secured claim in Respondent's Chapter 11 proceeding on November 1, 1985. (Appendix p. A-40) Petitioner and Respondent stipulated that the balance due on the claim is $621,471.14. The face value of Respondent's equity in Petitioner in the form of its certificates of participation is $1,116,129, and the parties agreed that Petitioner's claim is secured by these certificates. Pursuant to Article VIII, Section 1 of the Articles on Incorporation, Petitioner, in its discretion, is authorized to setoff such indebtedness against the amount of such certificates, but holders of certificates cannot require setoff. (Article VIII, Section 1, Appendix p. A-96)

Months after Petitioner had filed its secured claim, Respondent filed its Disclosure Statement and Plan of Reorganization. The Plan of Reorganization did not identify Petitioner as being a member of any class under the plan. (Appendix p. A-45) Neither identified Petitioner as a secured creditor which would be impaired by the Plan of Reorganization. Neither document disclosed that Respondent intended to satisfy Petitioner's secured claim by other than a cash payment.

About eight months after confirmation of Respondent's Plan of Reorganization on August 4, 1987, Respondent filed a Notice of Intent to abandon part of the secured property held by Petitioner in full satisfaction of Petitioner's secured claim. (Appendix p. A-83) No provision was made for abandonment under the Plan, and no disclosure of intent to abandon was included in the

Disclosure Statement. Petitioner objected to the motion to abandon. (Appendix p. A-86) A nonevidentiary hearing was held on the motion June 1, 1987. Briefs were not submitted because the Bankruptcy Judge advised the parties that he did not want to have the matters briefed. On June 5, 1987, the Bankruptcy Judge advised the parties by letter that "abandonment' was not an appropriate remedy but that he would proceed to determine whether Respondent, through plan modification, may surrender a portion of Petitioner's patronage certificates to Petitioner in satisfaction of Petitioner's secured claim. (Appendix p. A-88)

Neither prior to nor subsequent to June 6, 1987, has Petitioner proposed a plan modification and it has not complied with any of the requirements for plan modification. The parties thereafter agreed and Respondent's attorney communicated to the Bankruptcy Judge that the parties had agreed "to request that you decide the issue of whether FCX, through plan modification, may surrender a portion of FCX's patronage certificates of Universal to Universal in satisfaction of Universal's secured claim." (Appendix p. A-90)

Prior to the decision of the Bankruptcy Court, no plan modification had been proposed, no notice of plan modification had been given to Respondent's creditors, and no hearing was held to determine whether such a plan modification could be confirmed under 11 U.S.C. § 1129(b)—the cram down provision.

The United States Bankruptcy Court for the Eastern District of North Carolina, relying principally in *In Re: Massengill,* 73 B.R. 1008 (E.D.N.C. 1987), and without making findings of fact relating to any plan modification, held that Respondent could surrender to Petitioner that amount of Respondent's certificates of participation in Petitioner at face value to satisfy Petitioner's secured claim against Respondent. (Appendix pp. A-38-39) The Court stated that if the provisions of the Federal Farm Credit Act should not be permitted to override the provisions of the Bankruptcy Code, then neither should the by-laws of a cooperative organized under state law. The Court rejected Petitioner's alternative position that if it be required to accept surrender of certificates, the certificates should be valued at present value rather than face value because the certificates would not be paid or

redeemed, if at all, until a number of years in the future. The Court rejected this position, without an evidentiary hearing, because it claimed Petitioner had the discretionary right to immediately redeem the certificates and when it paid off, the certificates would be redeemed at face value. (Appendix pp. A-38-39)

The District Court affirmed the order of the Bankruptcy Court allowing modification of Respondent's Plan. (Appendix p. A-33) The Court held that the Bankruptcy Court superseded the discretionary power bestowed by state law and Petitioner's By-Laws with respect to the authority granted to the Board of Directors regarding revolvement of members' equity and that, therefore, the Bankruptcy Court has the power (1) to require the creditor to accept the surrender of the debtor's certificates of equity in the creditor, and (2) that the certificates of equity were to be valued at face value as a matter of law. (Appendix p. A-32) The District Court also held, contrary to Petitioner's assertion, that while all plan modification procedures were not strictly complied with, there was sufficient compliance, and Petitioner had waived strict compliance. (Appendix p. A-31)

Notice of Appeal was served January 13, 1988. Jurisdiction in the Court of Appeals was predicated on 28 U.S.C. § 1291.

In its opinion affirming the District Court, the Court of Appeals agreed with Petitioner that the nature and extent of a debtor's interest in property was to be determined by state law. The Court said that under state law and Petitioner's By-Laws, the equity certificates represented a contingent entitlement in the hands of Respondent not immediately payable and that the estate's interest was limited just as was the debtor's. (Appendix pp. A-16-18) However, by adopting a two-step analysis, the Court converted this contingent entitlement, not presently payable, to a presently due obligation and allowed Respondent, debtor-in-possession, to surrender the equity certificates in satisfaction of Petitioner's secured claim without authorization of the Board of Petitioner. The Court determined that this authority came from Section 1123(a)(5)(D). (Appendix pp. A-18-20) Moreover, the Court of Appeals held that even though the actual present value of the equity certificates was not equal to their face value, the indubitable equivalent standard of Section 1129(b)(2)(A)(iii) was met because the creditor had

the discretion to choose currently to redeem the patronage certificates or to delay redemption to some future date; and if it exercised that discretion to redeem, the redemption would be at face value.[2] (Appendix pp. A-24–28)

Petitioner argued to the Court of Appeals, as it had to the District Court, that Respondent was required to comply with procedures for plan modification, which procedures could not be waived by Petitioner and that an evidentiary hearing was required under Section 1129(b). The Court of Appeals, in rejecting this view, focused solely on Petitioner and held that notice was adequate as to it, the nonevidentiary hearing sufficent, the cram down provison was satisfied without evidence of present value, and that there would be no change in decision even if additional value evidence was presented.(Appendix pp. A-22–25)

REASONS FOR GRANTING THE WRIT OF CERTIORARI

A. The Decision Of The Court Of Appeals For The Fourth Circuit Is In Conflict With A Decision Of The Court Of Appeals For The Eighth Circuit.

In the case at bar, the Court of Appeals determined that Section 1123(a)(5)(D) superseded the law of the state and the By-Laws of Petitioner, and elevated contingent, not currently payable interest, to a current obligation to the extent that the debtor-in-possession could force the setoff of equity certificates immediately

---

[2] Petitioner urged, *inter alia*, that the indubitable equivalent standard of Section 1129(b)(2)(A)(iii) demanded that if Petitioner were to be required to accept less than all the collateral in satisfaction of its secured claim, the equity certificates must be valued under Section 506(a) at present value. Petitioner's position is that the present value of all the certificates might not equal its total claim, and it would become an unsecured creditor as to any unsatisfied claim. In so doing, Petitioner acknowledged that if Respondent offered **all** of the certificates it held in Petitioner, Petitioner would have to accept those certificates in satisfaction of its **secured** claim. To the extent that the present value of those certificates was not equal to the secured claim, Petitioner has an unsecured claim for the difference.

against the debt owed by the debtor to the certificate issuer. In the case of *In Re: Schauer*, 835 F.2d 1222 (8th Cir. 1987), the Court of Appeals for the Eighth Circuit affirmed a determination of the Bankruptcy Court that a trustee in a Chapter 7 proceeding, cannot transfer equity certificates in the debtor cooperative without approval of the issuer of the certificates. The trustee there argued 11 U.S.C. §§ 363 and 704. *Schauer* was a Chapter 7 proceeding, and this is a Chapter 11 proceeding. However, in both instances, the debtor was an agricultural cooperative under Minnesota law. In *Schauer*, the cooperative's article precluded transfer or assignment of any interest in the debtor's revolving fund without the consent of the board. Similarly here, equity certificates may only be paid or redeemed on an **equitable** basis as shall be determined by the board. Petitioner's Articles also provide that "nothing contained herein shall give the holders of such certificates, patronage capital, or other interest, any right to have such setoff made." (Appendix p. A-96) While it is arguable that the difference in the statutory provisions of the Bankruptcy Code relied on in the two cases makes them distinguishable as to preclude their being a conflict between the circuits, the importance of the question of the extent to which federal bankrupcty law supersedes state property law is of such significance that it should be decided by this Court. Moreover, because of the economic conditions in the agricultural sector of the economy, it is imperative that cooperatives know the extent to which their existence may be in jeopardy.

B. The Decision Of The Court Of Appeals Is In Conflict With A Decision Of This Court And Ignores The Relationship Between Sections 506(a) And 1129(b) Of The Bankruptcy Code

The Court of Appeals acknowledges that the present value of the equity certificates is not the equivalent of the face value of the certificates. However, because valuation at face value gives the creditor the amount it would receive had it voluntarily chosen to agree to the debtor's request for immediate setoff by redemption, the "indubitable equivalent" standard of Section 1129(b)(2)(A)(iii) is

met. (Appendix p. A-28) In *United Savings Association v. Timbers of Inwood,* ____ U.S. ____, 108 S.Ct. 626, 634 (1988), this Court indicated that Section 1129 of the Bankruptcy Code proceeded from the premise that in the confirmation context, a secured creditor is entitled to present value citing the historic precedential source of the "indubitable equivalent" language which Congress codifed in Section 1129, i.e., *In Re: Murel Holding Corporation,* 75 F.2d 941 (2d Cir. 1935) (J.L. Hand).

Moreover, the Court of Appeals determination again ignores the concept on which cooperatives are founded—equal treatment of members in like situations. Because equity certificates must be redeemed without discrimination and because they can only be redeemed when enough profits are available, the analogy to voluntary redemption made by the Court of Appeals, particularly at face value, jeopardizes the entire cooperative concept. If bricks and mortar must go, so too will the members' source of supply.

The Court of Appeals decision also causes confusion with respect to Sections 506(a) and 1129(b) of the Bankruptcy Code which should be settled by this Court. Section 506(a) separates an undersecured creditor's interest into a secured claim and an unsecured claim. The two parts are based upon the **value** of the claimant's collateral. Section 506(a) applies to property of the bankrupt estate secured by a lien and subject to setoff. Section 1129(b) allows the Court to confirm a plan of reorganization with respect to impaired classes of claims which have not accepted the plan if the plan is fair and equitable with respect to a class of secured claims which, as applicable to the instant case, includes a requirement that the holder of the claim realize "the indubitable equivalent" of the claim. Congress has stated that the class must be unimpaired or is "to receive under the plan property of a value equal to the allowed amount of their secured claim, as determined under proposed 11 U.S.C. § 506(a)." 1 Bankrupcty Code 685 (Collier Pamphlet Edition 1988). The indubitable equivalent standard adopted by Congress is that of Judge Learnard Hand found in *In Re: Murel Holding Corp.,* 75 F.2d 941 (2d Cir. 1935). *Id.* at 693. This standard requires that the creditor be compensated at present value. But that value, for purposes of

cram down, is not the same as what portion of a claim is secured and what is unsecured. As Congress has stated:

> Additionally a determination of what portion of an allowed claim is secured and what portion is unsecured in [sic] binding only for the purpose for which the determination is made. Thus determinations for purposes of adequate protection is not binding for purposes of "cram down" on confirmation in a case under chapter 11. 1 Bankruptcy Code, *supra* at 263.

The question of the relationship *vel non* between Sections of 506(a) and 1129(b) with respect to value needs definitive determination. This is not only important to the cooperatives of the United States but also to all those who become involved in valuation questions in cram down situations under the Bankruptcy Code.

C. The Court Of Appeals Has Sanctioned A Departure Of The Bankruptcy And District Courts From The Procedural Requirements Mandated By Congress For Plan Modification In Chapter 11 Bankruptcy Proceedings As To Require The Exercise Of This Court's Supervisory Power

Assuming, *arguendo*, that Petitioner has somehow waived its right to object to the notice and hearing requirements of 11 U.S.C. § 1127, neither Respondent nor the Bankruptcy Court has fulfilled the mandatory statutory obligations necessary for plan modification. Section 1127(b), in addition to its notice and hearing requirements, requires compliance with Sections 1122 and 1123. Significantly, Section 1122 requires the Petitioner to present a modification that sets forth an appropriate classification of claims and interest. Despite the obvious fact that Respondent's action appears to create an additional class of impaired secured claims, there is no written document setting forth the effect of such a classification on the entire plan of reorganization. Without such a classification, it is virtually impossible to determine whether the modified plan complies with the requirements of Section 1123.

Indeed, Section 1123(a)(4) requires that any plan provide the same treatment for each claim or interest in a particular class. In this case, since there is no written document setting forth the modification and the intent of the Respondent with respect to all classes of claims, the Bankruptcy Court could not, and did not, make a specific finding as to whether the plan modification met the requirements of either Sections 1122 or 1123.

Moreover, Section 1127(c) requires the Respondent to comply with Section 1125 with respect to the plan as modified. Section 1125 requires that all creditors be provided with "the plan or a summary of the plan, and a written disclosure statement." Although fourteen cooperatives were listed in Respondent's Disclosure Statement, only one was ever discussed as being an impaired creditor. (Appendix pp. A-56, 60) Assuming, *arguendo*, that Petitioner is now a member of a new impaired class, what is the effect of the "implicit modification" on other cooperatives? Without a written plan and disclosure statement, no one can tell. Without a written plan and disclosure statement, no one can determine whether Petitioner has provided to its creditors the "adequate information" required by Section 1125. Without a written plan and disclosure statement, no one can determine whether the modified plan is "fair and equitable." Petitioner has not, indeed it cannot, waive these congressionally mandated requirements.

If a debtor-in-possession is allowed to modifiy a plan in the manner authorized by the Bankruptcy Court in this case, the protections afforded to all creditors under Section 1125 have been rendered meaningless. The modification procedure authorized by the Bankrupcty Court is analogous to the piecemeal reorganization prior to plan modification that was condemned in *In Re: Continental Airlines, Inc.*, 780 F.2d 1223 (5th Cir. 1986). In that case, *Continental*, prior to submitting a plan of reorganization, sought approval under 11 U.S.C. § 363 to enter into lease agreements for two aircraft. Continental's creditors objected to the transaction. The Fifth Circuit vacated the order of the District Court affirming the Bankruptcy Court's approval of the transaction. The Court said:

> Likewise, if a debtor were allowed to reorganize the estate in some fundamental fashion pursuant to Section 363(b), creditor's rights under, for example, 11 U.S.C. §§ 1125, 1126, 1129(a)(7), and 1129(b)(2) might become meaningless. Undertaking reorganization piecemeal pursuant to 363(b) should not deny creditors the protection they would receive if the proposals were first raised in the reorganization plan.

Id. at 1227. In this case, the procedure authorized by the Bankruptcy Court allows Respondent to make a piecemeal modification of the plan. While the plan discloses Respondent's interest in a large number of cooperatives, it does not alert any of them that Respondent intended to satisfy debt through surrender of equity certificates. It did not alert any of them that Respondent intended to value its interest in the cooperatives at face value. The procedure followed by the Bankruptcy Court in this case cannot be allowed because, as the *Continental* Court noted, it renders creditor protection meaningless.

Thus, the "jerry-built" procedure initiated by Respondent and allowed by the Bankruptcy Court is totally inappropriate. Petitioner could not waive Respondent's statutorally mandated responsibility to provide notice to all creditors of a plan modification, nor could it waive Petitioner's responsibility to comply with Sections 1122, 1123, and 1125 of the Bankruptcy Code. In addition, Petitioner could not waive the Bankruptcy Court's duty under Section 1129 to make specific findings of fact required by Section 1129. In effect, the Bankruptcy Court in this case has granted Respondent a judicial dispensation from Respondent's obligation to comply with statutory requirements. Sections 1127(b) and (c) of the Code set forth the requirements that must be met for a plan modification after confirmation. The decision of the Bankruptcy Court ignores many of those requirements.

This Court has recognized that the power of the Bankruptcy Court must be found in the language of the Bankruptcy Code. In *Norwest Bank Worthington v. Ahlers*, ____ U.S. ____ , 108 S.Ct. 963 (1988), this Court rejected arguments that the Bank-

ruptcy Court had equitable power to avoid the absolute priority rule found in Section 1129(b)(2)(B). It said:

> The short answer to these arguments is that whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code.

Id. at 968. In this case, the Bankruptcy Court has allowed a plan modification procedure that is not found within the "confines of the Bankruptcy Code." The exercise of such a power is, therefore, improper.

It is the obligation of the Bankruptcy Court to assure protection of creditors. That obligation was not met here. The extent of that Court's obligation in plan modification matters is a significant question of federal law. The Bankruptcy Court, with approval of the District Court and the Court of Appeals, has substantially departed from the due process standards imposed by Congress to protect all creditors and those with interests in the estate of the debtor. The departure calls for the intrusion of this Court in the exercise of its supervisory power over other federal courts.

CONCLUSION

Respondent has been able thus far to use the Bankruptcy Code to destroy the very principles of cooperation it accepted when it became a cooperative and when it became a member of Petitioner. This use of the Code should not be permitted.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Eugene M. Warlich*
Attorney Registration No. 114637
James R. Crassweller
Attorney Registration No. 19690
DOHERTY, RUMBLE & BUTLER,
PROFESSIONAL ASSOCIATION
2800 Minnesota World Trade Center
30 East Seventh Street
Saint Paul, Minnesota 55101-4999
Telephone: (612) 291-9333
Attorneys for Petitioner

* Counsel of Record